Current Issue Review 91-7E

SEARCH, SEIZURE, ARREST AND DETENTION UNDER THE CHARTER

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Revised 21 February 1996

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Canada Communication Group -- Publishing
Ottawa, Canada K1A 0S9

Catalogue No. YM32-1/91-7-1996-02E
ISBN 0-660-16545-7

N.B. Any substantive changes in this publication which have been made since the preceding issue are indicated in **bold print.**

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SEARCH, SEIZURE, ARREST AND DETENTION UNDER THE CHARTER*

ISSUE DEFINITION

The *Canadian Charter of Rights and Freedoms* came into force on 17 April 1982. The legal rights guaranteed by the Charter are contained in sections 7 to 14. These sections deal with such matters as the right to life, liberty and security; the right to be secure against unreasonable search and seizure; the rights of an accused upon arrest; the right of an accused to certain proceedings in criminal and penal matters; and the right not to be subject to cruel and unusual punishment.

There are now a great number of decided cases dealing with these sections. This paper will concentrate on significant decisions of the provincial courts of appeal and the Supreme Court of Canada with respect to the provisions relating to search and seizure (section 8), arrest and detention (section 9 and section 10).

BACKGROUND AND ANALYSIS

A. The Interpretation of an Entrenched Charter

When analyzing the decisions of the courts with respect to these sections, it is important to remember that the Charter is entrenched in the Constitution of Canada and that, by virtue of section 52(1) of the *Constitution Act, 1982*, "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

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* The original version of this Current Issue Review was published in February 1992; the paper has been regularly updated since that time.

It could be argued that two sections of the Charter illustrate a conscious attempt by its framers to restrain the Canadian courts from achieving the level of judicial activism prevalent in the United States and to continue in some measure the Canadian tradition of parliamentary supremacy. Section 1 allows legislatures to impose reasonable limits upon rights and freedoms, while section 33 allows the legislatures to declare expressly that a statute may operate notwithstanding certain sections of the Charter.

In its decision in *Southam*, the Supreme Court of Canada indicated that "the task of expounding a constitution is crucially different from that of construing a statute." When considering the application of the Charter, it is important to recognize that it is a purposive document; that is, "its purpose is to guarantee and to protect within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action."

In this context of the contrast between the concepts underlying the Charter and the American Bill of Rights, this paper examines the legal rights protected by sections 8, 9 and 10. It comments on the issues that may arise from attempts to interpret and apply the various sections and goes on to discuss court decisions showing the impact of the sections on the criminal justice system.

B. Search or Seizure: Section 8

Section 8 of the Charter states:

> Everyone has the right to be secure against unreasonable search and seizure.

A variety of court decisions have dealt with the question of whether searches are or are not reasonable in various situations and the ancillary question of whether evidence obtained during the searches can be adduced at trial.

1. Application

The courts have held that a corporation is included in the word "everyone," which delineates who should receive the protection of this section. It has also been noted that because the

word "seizure" in this section is associated with the word "search," the protection afforded does not extend to the taking of real property by expropriation. As well, in *Thomson Newspapers Ltd.*, the Supreme Court of Canada said that the "essence of a seizure ... is the taking of a thing from a person by a public authority without that person's consent." Only something inanimate is subject to "seizure" because, as the Court said in this case, "the word 'seizure' ... should be restricted to tangible things." Thus, the "seizure" of a person's thoughts by ordering that person to testify does not amount to "seizure" under section 8.

In *Weatherall* v. *Canada (Attorney General)*, the Supreme Court of Canada held that section 8 of the Charter was not called into play by frisk searches and unannounced cell patrols conducted in male prisons by female guards. Since "imprisonment necessarily entails surveillance, searching and scrutiny," prisoners "cannot hold a reasonable expectation of privacy with respect to these practices."

The Supreme Court of Canada in *Hunter* v. *Southam Inc.* determined that section 8 of the Charter was applicable to the search and seizure sections of the *Combines Investigation Act*. The court found these sections to be unconstitutional for two reasons. First, the person designated to authorize the search under the legislation was not capable of acting judicially because he was also charged with investigative and prosecutorial functions as a member of the Restrictive Trade Practices Commission. Second, the sections of the *Combines Investigation Act* that dealt with authorizing searches and seizures did not achieve the minimum standard required by the Charter. This standard is that there must be reasonable and probable grounds, established under oath, to believe that an offence has been committed and that evidence of this offence is to be found at the place of the search. Thus, the court concluded that the search and seizure sections of the *Combines Investigation Act* were inconsistent with the Charter and therefore of no force or effect.

Similarly in *Kruger*, the Minister of National Revenue had authorized under the *Income Tax Act* a search of both the accused's business premises and the private residences and business premises of other named persons. This authorization was approved by a judge of the Superior Court of Quebec on the basis of an affidavit. Following the seizure, the accused made an application to the Federal Court, Trial Division, which subsequently struck down the authorization as unreasonable because it was a blanket order covering the violation of any provision of the Act

and was not limited to the particular violations allegedly committed. The judgment was upheld in the Federal Court of Appeal on the grounds that the Act conferred such a wide power that it left the individual without any protection against unreasonable search and seizure.

Although the Supreme Court of Canada has subsequently held that powers of inspection conferred by certain labour legislation also come within the ambit of section 8 of the Charter, it has declined to apply the strict guarantees set out in *Hunter*, "which were developed in a very different context." *Comité Paritaire* v. *Potash* concerned the powers of an agency responsible for implementing an *Act respecting Collective Agreement Decrees*, a Quebec Act that imposed specific working conditions and wages on a given industry. The Act allowed compliance to be monitored by the Comité, who could, at the workplace, "at any reasonable time" and without a warrant, examine and copy the employer's documents, verify wages and work hours and require the production of other information deemed necessary. Penalties for offences under the Act were exclusively in the form of fines and breach of a decree would generally lead to a civil action for wages. The Court ultimately found that "[i]n view of the important purpose of regulatory legislation, the need for powers of inspection, and the lower expectations of privacy, a proper balance between the interests of society and the rights of individuals does not require, in addition to the legislative authority, a system of prior authorization."

2. The Good Faith Test

The *Simmons* decision of the Supreme Court acknowledged Canada's right as a sovereign state to control both who and what crosses its boundaries. The fact that those travelling through customs have a lower reasonable expectation of privacy does not, however, diminish the obligation on state authorities to adhere to the Charter, even if the grounds prompting the search are reasonable and if drugs are found as a result of the search. Before any search, the inspectors must clearly explain the subject's rights under the Charter - especially the prior right to consult a lawyer - and the right to have the search request reviewed before complying with it, as provided in the *Customs Act*. In *Simmons*, the subject remained ignorant of her legal position because she was not properly informed of these rights. As a result, the Supreme Court found that the search was

unreasonable; even so, the evidence was not excluded since the customs officers had acted in good faith.

The Supreme Court of Canada had held in several cases decided before *Simmons* that the invalidity of a search power does not render evidence inadmissible if the officers conducting the search believed in good faith that the statutory provisions governing the search were constitutional. In *Greffe*, however, "the inference of extreme bad faith on the part of the police [arising] from their deliberate failure to provide the accused with the proper reason for the arrest" resulted in the exclusion of the seized drug evidence.

In *Greffe*, the R.C.M.P. had alerted customs officers in Calgary that the accused was returning to Canada with an unknown quantity of heroin. A visual search of his person was conducted after no heroin had been found in his luggage. He was not advised of his right to consult a lawyer or of his right under the *Customs Act* to have the search request reviewed by a justice of the peace, police magistrate or senior Customs Officer.

No drugs were found and the suspect was arrested, informed of his right to counsel and advised that a doctor would perform a body search at a hospital. During the body search a condom containing heroin was removed from the accused's anal cavity.

The Supreme Court found that at the time of the search the police had not had reasonable and probable grounds to suspect that the accused had drugs on his person; the informer's tip had not contained sufficient detail for the police to be sure that it was based on more than rumour. The informer had not disclosed the source of his knowledge, and the police had no indication of his reliability. Furthermore, there was confusion about the reasons the accused was given for his arrest. When combined with the lack of advice on the right to consult counsel, the "cumulative effect" of Charter violations was "very serious" and enough to warrant exclusion of the evidence.

3. "Warrantless" Searches

In *Collins* v. *The Queen*, the Supreme Court of Canada said that the Crown has the burden of establishing that a warrantless search is reasonable; a search will be reasonable if it is authorized by a law that is reasonable and is carried out in a reasonable manner. Section 10 of the

Narcotic Control Act authorizes police officers to search without warrant a place other than a dwelling-house, if they have reasonable grounds to believe that it contains a narcotic in respect of which an offence has been committed.

In the *Kokesch* case, the police conducted a "perimeter search" of the accused's property in order to find evidence of cultivation and possession of narcotics for the purpose of trafficking. The Supreme Court of Canada held that, where there was a mere suspicion of the crime, such conduct amounted to an unreasonable search and seizure. The police do not have the power under the common law to trespass on private property to conduct a search.

In the *Grant* and *Plant* decisions, both released 30 September 1993, the Supreme Court of Canada clarified a number of outstanding search and seizure issues. Like *Kokesch*, the two cases involved warrantless perimeter searches of private dwellings in the investigation of drug offences. In *R.* v. *Grant*, the court held that "warrantless searches pursuant to section 10 of the *Narcotic Control Act* must be limited to situations in which exigent circumstances render obtaining a warrant impracticable," in order to avoid violation of section 8 of the Charter. Exigent circumstances would include "imminent danger of the loss, removal, destruction or disappearance of the evidence," should the search be delayed to obtain a warrant. In the absence of evidence demonstrating those exigent circumstances, two warrantless searches conducted by the police were held to be unreasonable and in violation of section 8. Even without the information gained through the warrantless perimeter searches, however, there had been sufficient information to sustain the warrant subsequently obtained by the police to search inside the house. The court nevertheless considered excluding the evidence pursuant to section 24 (2) of the Charter, because there was a "sufficient temporal connection" between the invalid perimeter search and the evidence obtained pursuant to the valid warrant. The Court ultimately decided that the administration of justice would not be brought into disrepute by the admission of the evidence of marihuana plants found in the house. Even though the warrantless perimeter search involved a trespass by state agents where there was no urgency, the police had acted in good faith, the charges involved serious indictable offences and the admission of "real" evidence would not tend to render the trial unfair.

The Supreme Court of Canada also held that valid authorization for narcotics searches may be had under the warrant provisions of the *Criminal Code*, as well as under those of

the *Narcotic Control Act*; the British Columbia Court of Appeal had held that a search warrant had been improperly obtained under section 487 of the *Criminal Code* since warrants for *Narcotic Control Act* offences could only be issued pursuant to section 12 of that Act.

In *R.* v. *Plant*, six of seven judges in the Supreme Court of Canada held that there was no reasonable expectation of privacy in relation to computerized records of electricity consumption that would outweigh the state interest in enforcing laws against narcotics offences. Acting on an anonymous tip that marihuana was being grown in a basement, Calgary police had accessed utility records showing electricity consumption in the building to be four times the average of that in comparable properties. The Court held that the transaction records maintained as a result of the commercial relationship between the accused and the utility could not be characterized as confidential; the police were permitted computer access through a password and the information was also open to inspection by members of the public. Because the warrantless search of computer records was not unreasonable and did not fall within the parameters of section 8 of the Charter, evidence of the accused's high electricity consumption could be used to support an application for a search warrant under the *Narcotic Control Act*; however, information obtained by warrantless perimeter search could not be so used. Concurring in the result, Madam Justice McLachlin argued that there was "a sufficient expectation of privacy to require the police to obtain a warrant before eliciting the information" relating to electricity consumption.

In *R.* v. *Silveira*, the Supreme Court of Canada considered the validity of police actions in another drug investigation where, following the appellant's arrest, police had entered his home without a warrant in order to secure the premises and prevent the destruction of evidence. In the meantime, a search warrant was sought and obtained and a subsequent search of the home uncovered quantities of drugs and marked cash previously used by undercover officers when buying drugs from a third party. Writing for the majority, Mr. Justice Cory noted that the Crown had properly conceded that police action constituted a breach of the appellant's section 8 rights. Nevertheless, he upheld the use of the resulting evidence after considering the three tests for exclusion under section 24 (2) as previously set out in *R.* v. *Collins*. First, because the evidence would have been found in any event, its admission was held not to affect the fairness of the trial.

Second, although the facts revealed a serious Charter breach, the violation was committed under exigent circumstances with no evidence of bad faith on the part of the police. Finally, because of the seriousness of the crime and the need for the impugned evidence to prove the case, "[t]he admission of the evidence would not have an adverse effect upon the reputation of the administration of justice." However, the majority also emphasized that "after this case it will be rare that the existence of exigent circumstances alone will allow for the admission of evidence obtained in a clear violation of s. 10 of the *Narcotic Control Act* and s. 8 of the Charter."

With respect to other forms of warrantless search, the Supreme Court of Canada has further held that "sniffing" for marijuana at the door of a suspect's house constituted an unreasonable search. Thus, a warrant supported by the "evidence" thereby obtained was found to be invalid. Writing for the majority in *R.* v *Evans*, Mr. Justice Sopinka acknowledged an "implied invitation" extending to members of the public, including the police, to knock in order to communicate with the occupants of a dwelling. The police had approached with the intention of securing evidence against the occupant; thus, they were engaging in a search, which the lack of any prior authorization rendered unreasonable and in violation of section 8 of the Charter. Because, however, the police had acted in good faith, the impugned real evidence (in the form of marijuana plants) existed irrespective of the Charter violation, and the violation was not particularly grave, the Supreme Court of Canada held that the evidence was admissible since exclusion would have been more harmful to the administration of justice.

4. Warrant Improperly Granted or Obtained

In *Caron*, a search warrant was obtained only with respect to stolen traveller's cheques. During the search, no such cheques were found; however, police seized a prohibited weapon, which they had had reason to believe was on the premises when they applied for the search warrant. The court held that the police should have disclosed the fact that they were looking for a prohibited weapon when they requested the search warrant. "By withholding information

from the justice of the peace, and by achieving the desired result on the pretext of being interested only in other unrelated items, the informant was removing the process from the judicial arena." It was held that the warrant obtained did not provide legal authority to conduct the search for the weapon. Similarly, in the *Imough* case, it was learned at trial that the police officers had not had proper grounds for obtaining the warrant. The court held that to admit the evidence "would shock the conscience of the community and bring the administration of justice into disrepute having regard to the sanctity of a person's dwelling and [the fact] that the search in this case was conducted entirely without legal authority."

These decisions should be contrasted with the decision of the Ontario Court of Appeal in *Chapin*. The court, while agreeing that the police had conducted an unreasonable search and infringed the accused's rights under section 8 of the Charter, decided to admit into evidence the items found by the police. In deciding this, the court took into account such matters as the nature and extent of the illegality, the unreasonableness of the conduct involved, and the fact that the police had been acting in good faith.

In *Cameron*, the British Columbia Court of Appeal held that in order to obtain a search warrant under the *Narcotic Control Act* the narcotics must be on the premises at the time of the application for the warrant; however, the invalidity of the warrant does not by itself establish that the search made pursuant to it is unreasonable.

5. Plain View Doctrine

In *Shea*, the Ontario High Court followed the "plain view" doctrine cases in the United States in deciding that, once a police officer is lawfully in residential premises, he has the right to seize articles such as narcotics that are in plain view.

6. Search of the Person

A review of the cases where search of a person was conducted seems to indicate that the courts strictly scrutinize such searches and in many cases find them unreasonable and exclude any evidence they produce. For example, in *Collins*, a British Columbia case, the accused was sitting in a bar which was said to be frequented by heroin users and traffickers. The accused was

seized by two police officers; while one of them employed a choke hold that rendered her semiconscious, the other forced open her mouth. While this was happening, three caps of heroin dropped out of the accused's right hand. The court held that the officers in this case had not had reasonable and probable grounds to believe that narcotics were in the accused's mouth and that therefore the search was unlawful. The court went further and determined that to admit the evidence would bring the administration of justice into disrepute, for it would condone and allow the continuation of unacceptable conduct by the police. This decision was affirmed on appeal by the Supreme Court of Canada.

In *Heisler*, a random search of people entering a rock concert disclosed a large quantity of drugs in the accused's possession. The evidence revealed, however, that there had been no grounds upon which to base the search. The Alberta Provincial Court determined that the accused had been subjected to an unreasonable search that went beyond the bounds of mere bad taste and impropriety. The evidence was excluded on the grounds that to admit it would bring the administration of justice into disrepute. In the *Roy* case, however, the Ontario High Court held that where posted signs declare that entry to a rock concert is conditional on submitting to a search, such a search is not in violation of section 8.

In *Debot,* the police received a tip from an informant that the appellant was going to take delivery of a substantial quantity of the amphetamine "speed." He was stopped, ordered from his car, and told to assume a "spread eagle" position and to empty his pockets; speed was found. Although the search was carried out without a warrant, the Supreme Court of Canada held that the police had acted reasonably and that the evidence should not have been excluded as the trial judge had ordered. Chief Justice Dickson said that, although a detainee must be informed of the right to retain and instruct counsel immediately upon detention - a requirement the police had observed in this case - and although the "spread eagle" direction amounted to a detention, the police are not obligated to suspend a search as an incident to an arrest until the detainee has had the opportunity to retain counsel.

Chief Justice Dickson went on to say that denial of the right to counsel as guaranteed by section 10 of the Charter will result in a finding that a search is unreasonable only in exceptional circumstances. A search is reasonable if it is authorized by law, if the law itself is

reasonable and if the manner in which the search is carried out is reasonable. The denial of the right to counsel does not affect the "manner" in which the search is conducted, which, according to the Court, relates to "the physical way in which it is carried out." The Court also said that "evidence obtained by way of a search that is reasonable but contemporaneous with a violation of the right to counsel will not necessarily be admitted" and, indeed, "evidence will be excluded if there is a link between the infringement and the discovery of the evidence, and if the admission of the evidence would bring the administration of justice into disrepute."

This position has been repeated many times by the Supreme Court in what now amounts to a plethora of search and seizure cases heard since the Charter came into force and of which the majority have had to do with drug seizures. However, *Langlois and Bedard* marked the first time the Court comprehensively considered the question of the existence and scope of the power of the police to search a person who has been lawfully arrested. In that case, the appellants were constables employed in Montreal. The respondent, Cloutier, a lawyer practising in that city, was stopped by the constables after he had committed a motor vehicle infraction. When it was discovered that a warrant of committal for unpaid traffic fines had been issued for him, he was arrested and "frisk searched" before being placed in the patrol car. Cloutier subsequently charged the appellants with common assault, contrary to the *Criminal Code*.

The Supreme Court analyzed the scope of the recognized and long established common law power of the police to search a lawfully arrested person and to seize anything in his or her possession or immediate surroundings in order to guarantee the safety of the police and the accused, to prevent the latter's escape or to obtain evidence.

Following the *Collins* and *Debot* decisions, the Court held that a search will not be wrongful if it is authorized by law, if the law is itself reasonable and if the search is conducted in a reasonable manner. Therefore, since a frisk search "is a relatively non-intrusive procedure: outside clothing is patted down to determine whether there is anything on the person of the arrested individual," it "does not constitute, in view of the objectives sought, a disproportionate interference with the freedom of persons lawfully arrested. There exists no less intrusive means of attaining these objectives."

The Court outlined three criteria for establishing a search as reasonable and justified: (1) that the police are under no duty to search but can exercise their discretion in each case, based on the particular facts; (2) that the search is "for a valid objective in pursuit of the ends of criminal justice," such as a search for weapons or evidence; and, (3) that the search "must not be conducted in an abusive fashion."

7. Electronic Surveillance

In *R.* v. *Thompson*, the Supreme Court of Canada held that the police cannot indiscriminately bug any and all pay phones that the accused might use; this would violate the public's right to be free from unreasonable search and seizure. However, broadly-worded clauses in a judicial authorization permitting the bugging of phones at any place to which a suspect might "resort" are valid, provided the police have reasonable and probable grounds for believing that the person actually "resorts to" that place.

The Supreme Court of Canada decisions rendered on 25 January 1990 in the *Duarte* and *Wiggins* cases had a significant impact on policing methods, particularly undercover investigations involving drug and morality offences. In *Duarte*, the Court said that unauthorized electronic surveillance (i.e., room "bugging" or tape recording telephone conversations) and interception "of private communications by an instrumentality of the state with the consent of the originator or intended recipient thereof, without prior judicial authorization, does infringe the rights and freedoms guaranteed by section 8." Until then, it had been legal for the police to intercept such communication, as long as one of the parties to the conversation consented. It is now necessary for a judge to authorize such interception in the same way as interception of an entirely private conversation ("wiretapping") where neither party has given prior consent.

In *Duarte*, the Supreme Court said that "the primary value served by section 8 is privacy," which it defined as "the right of the individual to determine when, how, and to what extent he or she will release personal information." Accordingly, "one can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance and to which, in consequence, the protection accorded by s. 8 should be more directly aimed." The Court took the position that it could no longer allow the police an "unfettered discretion ... to record and transmit

our words" without prior judicial authorization because this widespread police practice represented an "insidious danger" to the "very hallmark of a free society," namely, the "freedom not to be compelled to share our confidences with others." In *Wiggins*, the use of "body pack" microphones by police was also found to be unconstitutional, for the reasons expressed in *Duarte*.

In *Wong*, the Supreme Court extended even further the protection of the individual from invasion of privacy by the state. The Court held that the accused, by using public notices in restaurants to invite people to an illegal gambling operation in a hotel room, had not opened this operation to the public to the extent that it was no longer a private event. He had therefore not relinquished his protection under section 8. The Court applied the criterion developed in *Duarte*; it held that, although the accused had distributed public notices, these did not connote "tacit consent" to electronic surveillance by the police. Therefore, the gambling operation was still "private" and the unauthorized video surveillance by the police constituted an unreasonable search and seizure under section 8.

In *R.* v. *Wise*, the Supreme Court of Canada had occasion to consider the admissibility of evidence obtained through unauthorized installation and monitoring of an electronic tracking device. After installing a tracking device in the back seat of a car belonging to a "suspected serial killer," the police had followed the accused and obtained evidence to support mischief charges relating to damage of a communications tower worth millions of dollars.

The Court was unanimous in finding that both the installation and subsequent monitoring constituted unreasonable searches, in violation of section 8 of the *Charter*. However, a four to three majority held that the admissibility of the evidence must be considered in the context of a minimal intrusion of the "lessened privacy interest" attached to the operation of a motor vehicle as well as "the urgent need to protect the community." Since the location of the car at the time of the offence was "real" evidence that would not affect the fairness of the trial, and since the Court of Appeal had found that the police had acted in good faith, the majority of the Court held that admitting the evidence would not bring the administration of justice into disrepute. Relying on the Supreme Court's earlier decision in *Kokesch*, however, the three dissenting justices would have excluded the evidence, since it was obtained through an illegal trespass knowingly committed by the police.

The Supreme Court has also considered the procedure for allowing the accused access to confidential "sealed packets" containing legal documents on the basis of which judicial authorization for wiretapping is granted. In *Dersch* v. *Canada*, and *R.* v. *Garofoli*, the court held that for access to be granted the accused need only make a request to examine the legal documents in the "sealed packet." Such access is necessary to permit the accused to make a full answer and defence, and in particular, to evaluate whether the wiretapping has been carried out in conformity with section 8.

Bill C-109, An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radio Communication Act, S.C. 1993, ch. 40, was proclaimed in force on 1 August 1993. The Act addresses a number of the issues raised in the aforementioned *Duarte*, *Wong*, *Garofoli* and *Wise* cases.

For example, police may intercept private communications, with the consent of the originator or intended recipient and without prior judicial authorization, for the purpose of preventing bodily harm to the person consenting. The Act also specifically contemplates judicial authorizations for video surveillance and for the use of electronic tracking devices. In addition, it codifies procedure for courts to follow in allowing an accused access to the contents of the "sealed packet," in trials where electronic surveillance has been authorized.

8. Breath Tests and Blood Samples

The cases usually hold that compulsory breath tests do not constitute unreasonable search and seizure since they can be demanded only when there are reasonable and probable grounds to believe the motorist is impaired. The Ontario case of *R.* v. *Fraser* has determined that in the absence of reasonable and probable grounds, the taking of a breath sample amounts to unreasonable search and seizure.

The courts seem to be agreed that there is no unreasonable search and seizure where hospital personnel take a blood sample from an accused for use in treating him and where the sample is later turned over to the police pursuant to a search warrant.

In *Dyment*, however, the Supreme Court of Canada held that evidence concerning the results of a blood sample analysis should be excluded when a doctor who had taken a sample

for purely medical purposes turned that sample over to an investigating police officer who had not noted signs of impairment and who had not asked the respondent or the doctor to provide a blood sample. The Court said that section 8 is concerned not only with the protection of property but also with the protection of the individual's privacy against search or seizure. It considered the doctor's action in taking the blood and the police officer's acceptance of it as very serious Charter breaches: "A violation of a persons's body is much more serious than a violation of his office or even his home," said the Court.

In *R.* v. *Colarusso*, the Supreme Court of Canada was called upon to consider whether police use of evidence obtained under Ontario's *Coroner's Act* constituted a breach of the accused's section 8 Charter rights. The accused had been arrested and taken for hospital treatment, following a motor vehicle accident. The Coroner had subsequently seized blood and urine samples taken from the accused for medical purposes, pursuant to his statutory authority under section 16 of the *Coroner's Act*. The samples were then given to the police for analysis. The accused was later convicted of impaired driving causing bodily harm and criminal negligence causing death, on the strength of subpoenaed evidence given by the analyst. A five-four majority of the Supreme Court of Canada held that the Coroner's seizure was reasonable only as long as the evidence was used for valid non-criminal purposes under the Act. However, once "appropriated by the criminal law enforcement arm of the state for use against the person from whom it was seized," the seizure was unreasonable and in violation of section 8 of the Charter.

Nevertheless, the Court held that the evidence of impairment was admissible against Mr. Colarusso; this was based on a number of findings. First, the evidence was real evidence that existed prior to the infringement of section 8. Second, the hospital staff, the Coroner and the police had all acted in good faith and pursuant to what they believed to be valid statutory authority. Finally, if they had known it was necessary, the police could have obtained a warrant to seize the evidence or to obtain another blood sample. Those facts, "coupled with the aggravating circumstances surrounding the commission of the offence," caused the Court to conclude "that the administration of justice would not be brought into disrepute by the admission of the evidence."

9. Garbage

In *R.* v *Krist*, the British Columbia Court of Appeal considered whether police seizure of garbage bags left on the street for collection amounted to unreasonable search or seizure. The police used the presence of marijuana plants and other paraphernalia found in the garbage to obtain warrants to search the appellants' home and vehicle, where additional plants and growing equipment were found. Relying on obiter comments made by the Supreme Court of Canada in *R.* v *Dyment*, the Court of Appeal found that once trash is "abandoned by a householder to the vagaries of municipal garbage disposal," he or she no longer has "a reasonable expectation of privacy in respect of it." Thus, even though its seizure was based on a tip of unknown reliability, police action did not amount to a breach of section 8 of the Charter.

10. Waiver

The Supreme Court of Canada has also had occasion to consider the nature of the consent required to waive an accused's section 8 rights concerning blood samples for DNA analysis. In *R.* v. *Borden*, the accused had been arrested on a charge of sexual assault and advised of his right to counsel, before consenting to provide a blood sample to the police for purposes "relating to their investigations." The police had not informed the accused that he was also suspected in an earlier sexual assault and that they wanted the sample primarily for the purposes of that investigation. In the majority decision, Mr. Justice Iacobucci held that police failure to inform the accused of their predominant purpose in seeking the blood sample meant that there was no valid consent or waiver of his section 8 rights. At minimum, the police should have made it clear that the accused's consent would be treated "as a blanket consent to the use of the sample in relation to other offences in which he might be a suspect." In the absence of such a waiver, or some other lawful authorization, the taking of blood was an unreasonable seizure. The majority of the Court also found a breach of the accused's right to be informed of the reasons for his arrest under section 10(a) of the Charter and, consequently, his right to counsel under section 10(b). Finally, the Court concluded that admitting the DNA evidence would render the trial unfair, since it was

obtained from the accused who was "completely uninformed about the main purpose of the police" in requesting it.

C. Arrest and Detention: Sections 9 and 10

These sections of the Charter state:

> 9. Everyone has the right not to be arbitrarily detained or imprisoned.
>
> 10. Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefor;
>
> (b) to retain and instruct counsel without delay and to be informed of that right; and
>
> (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

Standards by which the "arbitrariness" in section 9 can be measured are fast being established with successive decisions of the Supreme Court of Canada. Thus, it is arbitrary and offensive for the police, with little or no reason, to detain or arrest a person for questioning or for further investigation. It is not improper, however, for them to pursue their investigation following an arrest made on the basis of their reasonable and probable belief that the accused was committing or had committed an offence. In *Storrey,* the Court said that to make an arrest the police require nothing more than reasonable and probable grounds. They do not have "to establish a *prima facie* case for conviction before making the arrest."

With reference to section 10(a) *Amos* states that the Charter now enshrines what has always been the case in Canada: the law does not recognize any police right to arrest or forcibly detain any person who is not charged with an offence, merely in order to investigate an offence that the police believe has been committed.

The courts, when applying section 9, have tended not to overturn standard police practices. Thus, police demands that an accused submit to finger printing as required by law have

been held not to be unreasonable or capricious. In the *Beare* and *Higgins* case, the Supreme Court of Canada held that taking the fingerprints of an accused who is in custody or is directed to appear, by an appearance notice or summons, does not violate any of sections 7, 8, 9, 10, 11(c) or 11(d) of the Charter. The Court said that fingerprinting is not contrary to the principle of fundamental justice and that the procedure is a relatively minor intrusion compared to others permitted the police at common law. Finally, although the Court acknowledged that the Charter guarantees a reasonable expectation of privacy, it held that a person arrested or charged must expect a significant loss of personal privacy.

It has also been decided that the provisions of this section are not infringed when a police officer stops a motorist on a highway for a vehicle check, and, after smelling alcohol on the motorist's breath, demands a breath test.

1. Random Stops of Motorists by the Police

In a series of three cases (*Dedman* in 1985, *Hufsky* in 1988, and *Ladouceur* in May 1990) the Supreme Court of Canada pronounced on the constitutionality of police random stopping of motorists. In *Dedman*, Mr. Justice LeDain, for the majority of the Court, held that the 1980 Ontario R.I.D.E. program, in which police deployed checkpoints to screen impaired drivers, did not impinge a Charter right - even though the police did not have the statutory authority to conduct a random stop. The reason was that driving is a "licensed activity that is subject to regulation and control for the protection of life and property."

Mr. Justice LeDain also delivered the unanimous opinion of the Supreme Court in *Hufsky*, where the constitutionality of another Ontario police practice - spot check random stops - was reviewed. Unlike the R.I.D.E. program in *Dedman*, at issue in *Hufsky* was more than a search for impaired drivers. The random stops during these spot checks had a broad range of purposes, including checking for insurance papers and for the vehicle's mechanical fitness. Mr. Justice LeDain said that the absence of police guidelines meant that the stops constituted arbitrary detention in violation of section 9 of the Charter, since the decision to stop a vehicle was made absolutely at the discretion of the police. That being said, however, his Lordship considered that the Charter limit imposed by the *Highway Traffic Act* was demonstrably justified in the interest

of public safety. Again, for the Court, it was significant to note that driving could not be considered a fundamental right but was rather "a licensed activity subject to regulation and control."

In *Ladouceur*, at issue was the Ottawa police's random stopping of a vehicle for essentially no reason and not as part of either an organized or spot check program. The Supreme Court split 5-4 in holding that this was an arbitrary stop that, following the *Hufsky* decision, was in violation of section 9 of the Charter. The stopping was not ruled to be unconstitutional, however, because it was a reasonable limit, demonstrably justified in a free and democratic society. The dissenting four justices agreed in the result, although they felt that allowing such a practice went beyond what the police should be enabled to do and gave them an unlimited right to stop vehicles.

In November 1992, the Supreme Court of Canada had occasion to review the extent of police powers over motorists detained at random check stops. In *Mellenthin* v. *The Queen*, the Supreme Court decided that visual inspection of vehicles with a flashlight was necessarily incidental to a check stop program carried out after dark. However, "a check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over. Unless there are reasonable and probable grounds for conducting the search, or drugs, alcohol or weapons are in plain view in the interior of the vehicle, the evidence flowing from such a search should not be admitted."

2. Right to Retain Counsel

a. The Interests Protected

In *Kelly*, the Ontario Court of Appeal drew a distinction between the interests protected by paragraphs (a) and (b) of section 10. With respect to paragraph (a), the court held that a person is not obliged to submit to an arrest without knowing the reason for it; accordingly it is essential that the person be informed "promptly" of the reason. On the other hand, the purpose of paragraph (b) is to protect someone from prejudicing his or her legal position by saying or doing something without the benefit of legal advice. The requirement that the accused be informed "promptly" of the reason for the arrest means that the information must be given "immediately." However, the requirement that the accused be informed of the right to counsel "without delay" is

not the same as requiring that the accused be informed "immediately." There may be good reason for an arrested person to be informed "without delay" of the right to counsel, but there is no essential reason why that must be part and parcel of the statement under paragraph (a) of the reason for the arrest; such a statement is really part of the arresting process itself.

In *Ironchild*, it was held that where an accused is asked whether he or she wishes counsel, gives an ambiguous reply and expresses only a vague desire to consult a lawyer, it is proper for the police to repeat the question without doing anything further. In the majority of other cases, however, the courts have held that this right requires that the accused be given a real opportunity to retain counsel. In the *Nelson* case, it was stated "there should not be a mere incantation of a 'potted version' of the right followed by conduct on the part of the police which presumed a waiver of the right. ... The thrust of this provision is the guarantee of information so that an early opportunity to make a reasoned choice is available to the accused. The purpose of making the accused aware of his right is that he may decide, and that means he should have a fair opportunity to consider whether he wishes to resort to his right."

In *R.* v. *Evans*, the Supreme Court of Canada considered the extent to which arrested people must understand the police statement of their rights and when the police must reiterate the statement. When the accused in this case, who had an I.Q. of between 60 and 80, was informed of his rights and asked whether he understood them, he replied that he did not. Nevertheless, the police, who were aware of his diminished mental capacity, took him to the station and conducted interviews that eventually led to his confessions to two murders. The Court held that this was a violation of the accused's right to counsel, and that the evidence of the confessions must be excluded under section 24(2).

In overturning the conviction and acquitting the accused, the Court categorically rejected the Appeal Court's claim that the administration of justice would fall into disrepute if a self-confessed killer were freed merely because his right to counsel had been violated. The Court found that, due to the Charter violation, the reliability of the accused's confessions was suspect, and he had not had a fair trial. The position of the Appeal Court had effectively presumed the accused's guilt. A majority of the Court also held that the accused's section 10(b) rights had been

violated when the police began to suspect him of murder rather than a lesser offence but did not inform him anew of his right to counsel.

As a result of this case, police may have to make extra efforts to ensure that suspects understand their rights, particularly in cases involving children, people who do not speak the language used by the police, and those with diminished mental capacity.

The Supreme Court of Canada has since held that the right to counsel could not be validly waived by young persons who were unaware that they could face life imprisonment if their case was transferred to adult court. In *R.* v. *I.(L.R.) and T.(E.)*, the Court said that if waiver is to be relied upon, the young person must know "the extent of his or her jeopardy." Stopping short of a blanket requirement that the police advise an accused of the maximum penalty he or she might face, Mr. Justice Sopinka was of the view that "the particular characteristics of young offenders make extra precautions necessary in affording them the full protection of their Charter rights."

In *R.* v. *Whittle*, the Supreme Court of Canada has also considered the mental capacity required for a valid waiver of an accused's right to counsel. Mr. Whittle was a schizophrenic, who, at the time of his confession, was aware of what he was saying and understood the consequences, but was so disturbed that he did not care about them. Declining to impose a higher standard of cognitive ability than that required to stand trial, the Court applied the "operating mind" test; this requires "sufficient cognitive capacity to understand what he or she is saying and what is said," including the ability to understand the caution that evidence can be used against the accused. The Court found that evidence of an "[i]nner compulsion, due to conscience or otherwise, cannot displace the finding of an operating mind unless, in combination with conduct of a person in authority, a statement is found to be involuntary."

b. Obligations of Law Enforcement Agencies

The Supreme Court of Canada has also considered whether there is an obligation upon the police to assist an accused person to exercise the right to counsel.

In *Manninen*, the Court held that section 10(b) imposes at least two duties on the police in addition to the duty to inform the detainee of his or her rights. First, the police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct

counsel without delay; this includes the duty to offer the respondent the use of the telephone. Certain circumstances might make it particularly urgent for the police to continue their investigation before facilitating a detainee's communication with counsel; however, there was no such urgency in *Manninen*. Second, the police must refrain from questioning the detainee until the latter has had a reasonable opportunity to retain and instruct counsel. The purpose of granting right to counsel is not only to allow detainees to be informed of their rights and obligations under the law but also, and equally if not more important, to obtain advice as to how to exercise those rights.

In this case, the police officers had informed the respondent of his right to remain silent, but had proceeded to question him after he had "clearly asserted his right to remain silent and his desire to consult a lawyer." For the right to counsel to be effective, the accused would have to have had access to legal advice before being questioned or otherwise required to provide evidence. This aspect of the respondent's right to counsel was clearly infringed, however, as police had continued questioning when there had been no urgency to justify it. The respondent had not waived his right to counsel by answering the police officers' questions. Though a person may implicitly waive the rights under section 10(b), the standard is very high and was not met in this case.

In *Baig*, the Supreme Court held that the police obligation to provide an opportunity to retain and instruct counsel was not triggered until the accused expressed a desire to exercise that right. The corollary of this ruling would seem to be that police failure to promote the exercise of a Charter right would not amount to a Charter violation if the accused had not invoked the right.

However, in *R.* v *Brydges*, the Supreme Court has since held that an accused's statement that he could not afford a lawyer amounted to a request for counsel. The accused, a native of Alberta who had been arrested in Manitoba for murder, was informed without delay of his right to retain and instruct counsel. He was again advised of this right at the police station. When the accused asked the investigating officer if Legal Aid existed in Manitoba, because he could not afford a lawyer, the officer replied that he thought there was such a system in the province, but made no attempt to confirm this. When then asked if he had a reason for wanting to speak with a lawyer, the accused said that he had not. After making a number of incriminating

statements, the accused asked to speak with a Legal Aid lawyer. After his request had been granted, the accused declined further discussions with the police.

In upholding the trial court decision to exclude the incriminating statements because the accused's rights under section 10(b), had been violated, the Supreme Court said that "(w)here an accused expresses a concern that the right to counsel depends upon the ability to afford a lawyer, it is incumbent on the police to inform him of the existence and availability of Legal Aid and duty counsel." Here, "the accused was left with the mistaken impression that his inability to afford a lawyer prevented him from exercising his right to counsel." The accused could not waive something he did not fully understand (i.e. his section 10(b) rights).

As a consequence of *Brydges*, the police are now under two additional duties beyond that of informing the detainee of his section 10(b) rights: they "must give the accused or detained person a reasonable opportunity to exercise the right to retain and instruct counsel, and ... refrain from questioning or attempting to elicit evidence from the detainee until the detainee has had that reasonable opportunity." The detainee must still exercise "reasonable diligence" in exercising this right and can, either explicitly or implicitly, waive it; however, he must understand and be aware of the consequences of so doing and any implicit waiver will be scrutinized very closely by the Court.

The Supreme Court also said that the police must advise of the existence and availability of duty counsel and Legal Aid in all cases of arrest or detention - not only those where the detainee is or appears to be impecunious. This is the case even if, following advice from the police about section 10(b) rights, the detainee does not ask to speak with a lawyer. If the accused does not make a reasonably diligent effort to exercise the right after such advice is given, then, as the Supreme Court of Canada said in the *Smith* case, the police are not required to refrain further from attempting to elicit evidence.

Notwithstanding *Brydges*, the nature and extent of the advice that must be available to an accused in order to preserve section 10(b) rights were not yet settled. In addition to requiring that detainees be advised of their right of access to duty counsel, the Prince Edward Island Court of Appeal, in *R.* v. *Matheson*, held that *Brydges* meant that it was "up to those responsible for the administration of justice in the Province to ensure that the service is available." Leave to appeal to

the Supreme Court of Canada was granted in *Matheson* and in *R.* v. *Prosper*, a decision of the Nova Scotia Court of Appeal that took a different view. On appeal of those two cases, the Supreme Court ultimately held that "s. 10(b) of the Charter does not impose a positive obligation on governments to provide a system of `Brydges duty counsel,' or likewise, afford all detainees a corresponding right to free, preliminary legal advice 24 hours a day."

In *R.* v. *Burlingham*, the Supreme Court of Canada had occasion to consider the obligations of police or Crown counsel with respect to plea bargains. Writing for the majority, Mr. Justice Iacobucci held that s. 10(b) "mandates the Crown or police, whenever offering a plea bargain, to tender that offer either to accused's counsel or to the accused while in the presence of his or her counsel, unless the accused has expressly waived the right to counsel." Furthermore, section 10(b) was held to prohibit police "from belittling the accused's lawyer with the express goal or effect of undermining the accused's confidence in and relationship with defence counsel." The majority went on to find that police had infringed Burlingham's right to counsel by placing such an offer directly to the accused and leaving it open only for the period of time they knew that his lawyer was not available. Furthermore, because the accused's confession, the murder weapon, and his girlfriend's testimony would not have been available "but for" the Charter breach, all that evidence would be excluded from a new trial.

c. Application to Sobriety Tests

In *Therens*, the Supreme Court of Canada considered the issue of breathalyzer testing and section 10(b) rights. In deciding whether a person arrested or detained for impaired driving need be informed of the right to retain and instruct counsel before responding to a breathalyzer demand, the Court offered for the first time a comprehensive definition of the word "detention" as used in section 10 of the Charter. The Court held that detention was the restraint of liberty, other than by arrest, by the police or some other agent of the State; such restraint was not limited to physical compulsion or control. Detention would also result, said the Court, if the individual submitted or acquiesced in such deprivation of liberty (in this case as the result of a breathalyzer demand) because he or she felt "the choice to do otherwise does not exist."

The Court went on to hold that a charge of failing the breathalyzer test or refusing to provide a breath sample, contrary to section 235, would not stand if the offending motorist had not been informed of the right to retain and instruct counsel without delay. Unlike the *Criminal Code* provision respecting an A.L.E.R.T demand, there was no implied limit on the right to counsel contained in section 235. Therefore, any violation of rights protected under section 10(b) of the Charter would not be "prescribed by law" within the meaning of section 1. Similarly, the Court held that the police are under no obligation to comply with section 10(b) of the Charter when the person is merely charged with impaired driving rather than failure of the breathalyzer test or refusal to provide a breathalyzer sample as distinct from an A.L.E.R.T. sample; in that circumstance there is no connection between the recovery of self-incriminating evidence and a Charter violation.

Many lower court decisions have followed *Therens*, with interesting results. One of these is the decision of the Appeal Division of the Nova Scotia Supreme Court in *Baroni*, which held that the results of physical coordination and sobriety tests conducted by police officers at the roadside were to be excluded in cases where the individual tested had not been informed of the right to retain and instruct counsel as provided in section 10(b) of the Charter.

3. Habeas Corpus: Section 10(c)

Habeas corpus means literally "you have the body." It is a term for a variety of ancient writs that commanded one person detaining another to produce the prisoner before a court or judge.

In *Gamble*, the Supreme Court of Canada breathed new life into this procedure by ruling that habeas corpus was, in appropriate circumstances, available as a Charter remedy. In this case, the respondent had been incarcerated following his conviction for a first degree murder for which he had been tried pursuant to *Criminal Code* provisions that were not yet in force.

Taking what it termed "a purposive and expansive approach," the Court granted the remedy of habeas corpus. The Court held that an individual enjoyed "a residual liberty interest" found in section 7 and it was clear in this case that the respondent had been deprived of his liberty in contravention of the principles of fundamental justice.

D. Test for Exclusion of Evidence under Section 24(2) of the Charter

The causal connection between the breach of an individual's section 10(b) rights and the recovery of evidence was considered by the Supreme Court of Canada in the *Black* case. During the investigation of a charge of murder, the police recovered the weapon used, a knife, after the appellant had given them a written statement. The Court held that there had been a breach of the appellant's rights under section 10(b); the police had continued to question her despite the fact she was drunk and despite her clear prior request for the opportunity to consult counsel. For this reason, any evidence recovered thereby and thereafter should be excluded.

In *R.* v. *Elshaw*, the Supreme Court of Canada discussed the appropriate test under section 24(2) of the Charter for admission or exclusion of a self-incriminating statement obtained in violation of an accused's rights under section 10(b) of the Charter. The Court held that exclusion of such statements obtained in this way should be the rule rather than the exception. Finding that the evidence had contributed substantially to conviction and that there had been no evidence of any urgency or necessity to obtain information from the accused at the time of detention, the Court ordered the evidence excluded. The majority held that admission of such evidence would "generally" amount to a substantial wrong or miscarriage of justice. For that reason, section 686(1)(b)(iii) of the *Criminal Code* could not be used to correct the errors made by the trial court.

In *R.* v. *Burlingham* (right to counsel) and *R.* v. *Silveira* (unreasonable search or seizure), the Supreme Court reviewed the factors previously canvassed in *R.* v. *Collins*, for the exclusion of evidence under section 24 (2). The three primary factors were held to be: "(a) does the admission of the evidence affect the fairness of the trial, (b) how serious was the Charter breach, and (c) what would be the effect on the system's repute of excluding the evidence." The answers to those questions may depend upon a number of factors including the nature of the evidence and whether it would very likely have been obtained in some other way, the presence or absence of good faith on the part of the police, and the seriousness of the crime.

PARLIAMENTARY ACTION

Bill C-109, An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radio Communication Act, S.C. 1993, ch. 40, was proclaimed in force on 1 August 1993.

The Act addressed legislative shortcomings identified in recent court decisions relating to police surveillance. It also dealt with concerns about the potential abuse of developing communications technology.

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